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rights, and not contrary to the public policy of the state, these ordinances are, by what seems to be the better opinion, within the scope of the power of a municipality to provide for the general welfare of its citizens. (6) It has been objected that those clauses in some of the ordinances which provide for the determination of the character of occupancy in a vacant block according to the wishes of the majority of the property owners on the block are void as constituting a delegation of authority to individuals; but this question has not been properly brought before the courts and is still undecided.¹⁶

CIRCUMSTANCES NECESSARILY ATTENDANT TO CONSTITUTE DURESS OF PROPERTY.—Formerly the effects which threats of the destruction or loss of his property might produce upon the mind of a man of ordinary firmness was not considered sufficient to destroy the voluntary character of acts done under such influence.¹ Yet it is probable that a wider credence is now given to the narrowness and severity of the rule of ancient times than the old cases justify.² Whatever the old rule may have been it is well settled now that jeopardy of a man's property may make him submit to the less of two evils and rob a transaction of its voluntary character.³ While it is not permitted that a man choose to give away his money or take his chance whether he is giving it away or not, and change his mind afterwards, yet it is open to him to show that he supposed

court, by a remarkable piece of construction held that the ordinance was divisible as to its retroactive and future operation, and that it was invalid as to its retroactive operation but valid as to its future operation.

It would seem that a failure to protect vested rights would invalidate an ordinance because, being unreasonable, it would not be valid exercise of the police power, and would, therefore, constitute a deprivation of property without due process of law. While the Fourteenth Amendment imposes no restriction upon the police power (see cases cited in note 9, *supra*); yet the legislation must be reasonable in order to constitute an exercise of the police power.

¹⁶ However the validity of a similar provision was involved in the case of *Cary v. City of Atlanta*, *supra*, and has been discussed in connection with that case.

¹ "My Lord Coke says that for menace in four instances a man may avoid his own act: 1. For fear of loss of life; 2. For fear of loss of a member; 3. Of a mayhem; 4. Of imprisonment. But menacing to commit a battery, or burn his house or spoil his goods is not sufficient to avoid the act; for if he suffer what is threatened he may sue and recover damages in proportion to the injury done him." Bac. Abr., tit. Duress, A. Skeate *v.* Beale, 3 P. & D. 597, 11 A. & E. 983.

In *Skeate v. Beale*, 11 A. & E. 983, 990, Lord Denman said: "* * * but the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."

² *Wakefield v. Newbon*, 6 Q. B. 277, 280, 13 L. J. Q. B. 258. In this case Lord Denman, C. J., speaking of *Skeate v. Beale*, said: "It was by no means unsupported by some ancient authorities; but perhaps it was laid down in terms too general and extensive."

³ *Green v. Duckett*, 11 Q. B. D. 275; *Swift v. United States*, 111 U. S. 22.

the facts otherwise or that he really had no choice.⁴ Where a person *sui juris*, with full knowledge of facts and not under pressure of abnormal conditions, commits himself to a transaction, regardless of the detriment and injury that he may suffer therefrom, the courts will not declare his act a nullity.⁵ The chaos that would ensue from such a state as this would be inestimable; no transaction would be closed and a person could not give effect or finality to his voluntary acts. Moreover, such a doctrine would be in effect the abrogation of the fundamental principle that adequacy of consideration is, in general, immaterial.

The rule *volenti non fit injuria* is applicable only where the party has his freedom of exercising his will and acts of his free agency. So, as a corollary not to be controverted, the primary requisite for the relevancy of the maxim is that there must be no pressure or constraint such as will compel a man to go against his will. Because cases of this nature are so much dependent upon their particular facts, there is apparently some confusion and conflict due to the application of the principles, but the general principles are practically universally accepted. Where one performs an act in order to receive that to which beyond question he is entitled, as to recover possession of his property from another who unjustly detains it, and where the illegal demand, based upon the wrongful denial of the absolute right of another, is attendant with circumstances of hardship and serious inconvenience, he is said to act under duress. It is manifest that two conditions must concur in order that an act be under compulsion and so capable of avoidance.

I. The withholding of the right from the party alleging duress, must have been without equity and the resulting demand, illegal. Where the exacting party has a right, however remote, to pursue the course against which, in order to protect his property, the complaining party has had to act, there can be no duress.⁶ For in such cases there is consideration for the act alleged to have been under coercion and the necessitous condition of the complaining party becomes immaterial. Likewise there can be no duress where the granting of the right is discretionary with the alleged exacting party,⁷ as where a license tax is exacted for a business the pursuit of which is not a natural right, but a mere privilege which may be granted or withheld at the option of the state.⁸ No case seems to have gone farther in declaring what is an illegal denial of an absolute right, than the late Virginia case of *Thomas v. Brown*.⁹ A Virginia statute, abrogating the common

⁴ Pollock, *Principles of Contracts*, 523.

⁵ *Wilson v. Ray*, 10 A. & E. 82; *Radich v. Hutchins*, 95 U. S. 210; *Brumagin v. Tillinghast*, 18 Cal. 265, 79 Dec. 176.

⁶ *Atlee v. Backhouse*, 3 M. & W. 633; *Harris v. Tyson*, 24 Pa. St. 347; *Wilcox v. Howland*, 23 Pick. (Mass.) 167.

⁷ *Atlee v. Backhouse*, *supra*.

⁸ *Emery v. Lowell*, 127 Mass. 138.

⁹ 116 Va. 233, 81 S. E. 56.

law rule, provided that part performance of an obligation, when expressly accepted in satisfaction, should discharge the obligation. The defendant, undisputed debtor of the plaintiffs, who were in such financial straits that legal remedy was inadequate, offered part payment of the debt which was accepted in full satisfaction. The court held that the acceptance was involuntary and that so the statute was inapplicable and that the balance of the amount due was recoverable. In short, the plaintiffs had an absolute right to the payment of the debt without resort to legal proceedings and the denial of this right was illegal.

II. Where the demand is illegal, in order for a compliance therewith to be considered involuntary, it must have been under such aggravated circumstances and such immediate danger of injury that legal remedy would have been inadequate to protect the complaining party from irreparable prejudice. In the recent case of *Baldwin v. Village of Chesaning* (Mich.), 154 N. W. 84, the refusal of certain town officials to grant a liquor license to the plaintiff unless he paid an illegal fee would have resulted in great depreciation in value of the plaintiff's property. The fee was paid under protest but no recovery of the same was allowed because, granting that he was justly entitled to the license, the courts could have completely indemnified him by forcing a grant of the same.¹⁰ Many cases agree, however, that where an illegal charge is paid to apprehend a destruction or cessation not business, the payment is under duress and recoverable.¹¹ Likewise pressing need or fear of destruction of property wrongfully detained, is sufficient to force a payment and so make it capable of recovery.¹² It seems that duress is present only when either the danger of the loss of the property as a result of the illegal detention, is present or apparent, or where the exigencies of the case make the immediate possession thereof imperative to the owner.

It is submitted that the voluntary character of the act is essential for the application of the maxim *volenti non fit injuria*, and that the act is involuntary—and so as a corollary of duress of prop-

¹⁰ In like manner, a person could not be under compulsion when no penalties could be suffered without judicial process to enforce them in which he would have an opportunity to test the legality of the demand. *Wilson v. Ray*, *supra*; *Cook v. Boston*, 9 Allen (Mass.) 393; *Lefferman v. Mayor of Baltimore*, 4 Gill. (Md.) 425.

¹¹ *Swift v. United States*, *supra*; *American Brewing Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129, 2 Ann. Cas. 821; *Scottish, etc., Insurance Co. v. Herriot*, 109 Iowa 606, 80 S. W. 665, 77 Am. St. Rep. 548; *Ratteman v. American Express Co.*, 49 Ohio St. 608, 32 N. E. 754.

¹² *Astley v. Reynolds*, 2 Str. 915; *Kearns v. Durell*, 6 C. B. 596, 18 L. J. C. P. 28; *Ashmole v. Wainwright*, 2 Q. B. 837; *Irving v. Wilson*, 4 T. R. 485; *Green v. Duckett*, *supra*; *Alston v. Durant*, 2 Strohart (S. C.) 257, 49 Am. Dec. 596; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 32 Am. St. Rep. 581, 16 L. R. A. 376; *Guetzkow v. Breese*, 96 Wis. 591, 72 N. W. 45; *First National Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296.

erty exists¹³—where a person is compelled to acquiesce in an illegal demand in order to protect his property. For this it seems sufficient if the will be constrained by the unlawful presentation of the choice between two comparative evils; as inconvenience of property, loss of property altogether or compliance with an unconscionable demand.¹⁴

APPLICATION OF THE SEVENTH AMENDMENT TO ACTIONS BROUGHT IN THE STATE COURTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.—It is obvious from the wording of the amendment itself that the jury trial contemplated by the Seventh Amendment,¹ to the Constitution of the United States is the same kind of jury trial as was necessary at common law, by a jury composed of twelve men of whom an unanimous verdict is required. And as a general proposition it is well settled that this amendment is a limitation only on the administration of law in the federal courts.² As was said by Waite, C. J., in the case of *Walker v. Sauvinet*,³ "this Seventh Amendment, as has many times been decided, relates only to trials in the courts of the United States * * *. The states so far as this amendment is concerned, are left to regulate trials in their courts in their own way."

These two principles have been clearly brought out in numerous cases which have held that a state statute providing for a jury trial of less than twelve or allowing a verdict other than unanimous is not contrary to the federal Constitution.⁴ And the proposition gives no trouble at all when applied to the enforcement of common law rights or rights created by state statute in state courts.

But a comparatively new and somewhat different aspect of the question arose in the recent case of the *Chesapeake & Ohio Ry. Co. v. Carnahan* (Va.), 86 S. E. 863, which is interesting more because of the novelty of the question involved than because of any difficulty of solution. In this case an action was brought by an injured employee against the Chesapeake & Ohio Ry. Co., under the Federal Employer's Liability Act in a state court of Virginia. The

¹³ It has been sought to draw a distinction between duress of real property and duress of personal property but this is not maintainable either upon principle or authority. *Joannin v. Ogilvie*, *supra*; *First National Bank v. Sargeant*, *supra*.

¹⁴ *Lonergan v. Buford*, 148 U. S. 581; *Harris v. Carey*, 112 Va. 362, 71 S. E. 551.

¹ The Seventh Amendment provides: "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

² *Brown v. New Jersey*, 175 U. S. 172; *Walker v. Sauvinet*, 92 U. S. 90; *Edwards v. Elliott*, 21 Wall. 532. See *Maxwell v. Dow*, 176 U. S. 581, 598.

³ 92 U. S. 90, 92.

⁴ *Brown v. New Jersey*, *supra*; *Franklin v. St. Louis & M. R. R. Co.*, 188 Mo. 533, 87 S. W. 930; *Taussig v. St. Louis & K. R. R. Co.*, 186 Mo. 269, 85 S. W. 378.